U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 September 2005

BALCA Case No.: 2004-INA-00323
ETA Case No.: P2003-NJ-02499267

In the Matter of:

ANACONDA CONSTRUCTION CO.,
Employer,

on behalf of

RENATO DA SILVA,
Alien.

Appearance: Cassandre C. Lamarre, Esquire[1]
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER[2]

PER CURIAM. This case arises out of an application for labor certification[3] on behalf of

[1] On June 30, 2004, Ms. Lamarre wrote to the Certifying Officer stating that she was withdrawing her appearances associated with Wall Street Associates, Inc. However, Ms. Lamarre filed a statement of position in this case with the Board on August 25, 2004 on Wall Street Associates letterhead.

[2] Citations to the Appeal File are abbreviated as "AF."

[3] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly,

Renato Da Silva (hereinafter "the Alien") filed by the Anaconda Construction Co. (hereinafter "the Employer") for the position of "truss carpenter." The Certifying Officer (hereinafter "CO") denied the application and this appeal ensued.

STATEMENT OF THE CASE

The Employer filed the application for labor certification on August 31, 2001. (AF 52). The position was listed in the application as "truss carpenter." The Employer described the job duties as follows:

> Erected pre-made wood roof trusses on top plates of frame structure for residential and commercial development projects using jammer [sic], nails, saws, levels, and hand and power tools. Prepares layout for positionig [sic] trusses from building plans and blueprints. Supervises one truss carpenters [sic] helper. Work days: Monday thru Friday.

(AF 52). The position required three years of experience in the job offered. (AF 52). In addition, the Employer sought Reduction in Recruitment (hereinafter "RIR") processing. (AF 73).

On April 6, 2004, the CO issued a Notice of Findings (hereinafter "NOF") indicating her intention to deny labor certification pursuant to 20 C.F.R. § 656.3, which defines "employment" as permanent, full-time work by employee for an employer other than oneself, and 20 C.F.R. § 656.20(c)(8), which requires that the job opportunity is clearly open to any qualified U.S. worker. (AF 58-59). The CO initially noted that the Employer had nine pending labor certification applications before her office. The CO then advised the Employer that there was no listing for the Employer's company name or Federal Employment Identification Number (hereinafter "FEIN") in the New Jersey Unemployment Insurance computer system. Moreover, the CO indicated that it is not clear how the Employer can "guarantee permanent full-time

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the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

employment to the alien, performing the duties shown in item 13 of the [ETA 750A] form, which consist solely of erecting pre-made wood roof trusses." (AF 58).

The CO also directed the Employer to document "how long you have been in business, the location(s) of your company, the complete starting and ending dates at each location, and what kind(s) of construction you specialize in." (AF 58). The CO requested information regarding the number of workers the Employer employed from 2001 to the present, their names, job duties, and their status as full- or part-time employees or non-employees. The Employer was also directed to submit copies of the employees' W-2 or 1099-MISC forms for the years 2001 and 2002, along with the company's Federal income tax returns for 2001 and 2002. The CO further advised that if the Employer indicates it has employees, it must document why there is no listing for the company in the State Unemployment Insurance system; and, if the company is listed, the CO instructed the Employer to furnish the corresponding name and number. (AF 58). More specifically, the CO directed the Employer to provide copies of Form NJ-927 Employer's Quarterly Report and a WR-30 Employer Report of Wages Paid for all quarters of 2001-2003, noting that if the Employer did not file these reports, it must "fully explain why," because "[f]ailure to do so is a violation of 20 C.F.R. [§] 656.20(c), which states that employer's job opportunity terms, conditions and occupational environment shall not be contrary to Federal or State law." (AF 58).

Finally, the CO directed the Employer to submit copies of work contracts dating back to 2001 in order to "document how [the Employer] can guarantee permanent full-time employment performing the duties shown in item 13 of the [ETA 750A] form." (AF 58).

In rebuttal, the Employer submitted a letter to the Chief Administrative Law Judge from the owner, Carlos Ferreira, Jr., dated April 13, 2004 (AF 51). Mr. Ferreira requested review of a Final Determination involving his application for labor certification on behalf of the Alien. However, no Final Determination had been issued as of April 13, 2004 in the Alien's case.[4] Mr.

[4] In her Final Determination, dated May 19, 2004, the CO noted that the Employer's April 13, 2004 letter requesting review was premature, "[s]ince there was no Final Determination." (AF 46). The CO explained that her office contacted the Employer's attorney for "clarification." According to the CO, the Employer's attorney stated that the Employer had already responded to a number of other Notices of Findings issued in other pending applications submitted by the Employer. Because the other pending applications involved the same issues, the Employer "did not want or need to [submit the rebuttal materials] again." (AF 46). The CO then advised the Employer's attorney

Ferreira explained that he is "not obligated to register for Unemployment Insurance (UI)." (AF 51). Rather, he stated that the Employer is a "sole proprietor and my employees are obviously not legal" and "do not have social security numbers." He further stated that he pays his employees with cash and provides them with 1099's. Mr. Ferreira then claimed that "once these applications are approved, [he] will have no objection to registering for [Unemployment Insurance]." (AF 51).

The Employer's letter also explained that the invoices submitted in rebuttal are "the invoices my company uses." (AF 51). In addition, the Employer argued that its request for the CO to further notify the Employer and to send specific examples of proper documentation if the CO found the invoices unacceptable was "simpl[y] dismissed." The Employer again insisted that its tax forms indicate an ability "to guarantee the prevailing wage and permanent full-time employment." (AF 51).

The Employer also attached a list of employees employed since 2001, a list of their duties, and their W-2 forms. (AF 5-42). The Employer submitted its Federal tax returns from 2001 and 2002, (AF 26-35), along with other documentation, including a copy of the company's business checking account statement, IRS identification numbers, and company insurance records. Finally, the Employer submitted three project invoices (two undated; one dated October, 2003). (AF 36-38).

On May 19, 2004, the CO issued a Final Determination (hereinafter "FD") denying labor certification. (AF 45-46). Citing to 20 C.F.R. §§ 656.3 and 656.20(c)(8), the CO noted that the Employer failed to provide documentation showing that a permanent, full-time position existed to which U.S. workers could be referred, if available. The CO also explained that "issues raised in this current NOF are pertinent and specific to this application since decisions are made on a case by case basis." (AF 46). Thus, the CO concluded that the Employer could not rely on the material submitted in another pending application on behalf of a different alien. (AF 46).

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that she had until May 11, 2004 to respond with rebuttal material, and that "there would normally have to be a rebuttal." (AF 46). According to the CO, the Employer instructed her "to use employer's letter of April 13, 2004 as a rebuttal." (AF 46).

Furthermore, the CO stated that the Employer's employees are "obviously not legal and do not have social security number" and the Employer pays his employees in cash and provides them with 1099's. However, as the CO noted, the Employer submitted W-2's on behalf of his employees instead of copies of their 1099's. (AF 46). The CO noted that there remained no record of the company in the New Jersey Unemployment Insurance system, and that the Employer failed to furnish copies of the NJ-927 Employer's Quarterly Report and the W-30 Employer Report of Wages Paid as instructed. The CO had directed the Employer to furnish these documents in order to show that the workers for whom the Employer submitted W-2's are actually employees. Accordingly, the CO concluded that because the Employer failed to submit these documents, it has failed to document that its job opportunity terms, conditions, and occupational environment are not contrary to Federal, State or local law. (AF 46).

As noted above, the Employer prematurely submitted a request for review in a letter dated April 13, 2004. *See* footnote 3, *supra*; (AF 51). On June 7, 2004, the Employer filed an undated letter addressed to the Chief Administrative Law Judge, in which it again requested review of the CO's denial of labor certification. (AF 4). The case was docketed with the Board on August 13, 2004.

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997). Here, the CO explicitly directed the Employer to submit service contracts documenting the existence of a *bona fide* job opportunity and its ability to provide permanent, full-time employment for a truss carpenter. In response, the Employer submitted invoices for three projects without explanation of how much of the work was performed by truss carpenters, along with the company's tax returns. Instead, the Employer simply claims that it is necessary to hire truss carpenters because it builds homes, condominiums, and townhouses "from the ground up."

As the CO explained, the Employer was required to submit documentation establishing that a *bona fide* opportunity exists, not merely whether it can adequately pay its employees'

wages. In other words, the Employer had to sufficiently prove that the position of truss carpenter is a true, permanent and full-time job at Anaconda Construction; not simply a position that exists on paper.[5] Thus, the company's tax returns proved insufficient to meet the Employer's burden. The CO provided the Employer with an opportunity to document a *bona fide* job opportunity. However, the Employer failed to provide any relevant documentation other than undated invoices that include superficial descriptions of the work performed and the cost of that work. In other words, the invoices submitted did not explain how much, if any, of the company's construction work is performed by truss carpenters or whether "truss carpenter" is a permanent, full-time position at Anaconda Construction. If an employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Moreover, the Employer did not supply sufficient explanation for its failure to submit an NJ-927 Employer's Quarterly Report or a W-30 Employer Report of Wages Paid to establish that it in fact has employees, as instructed by the CO. If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Moreover, if the CO's request for documentation having a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, the Employer provided nothing more than a statement regarding his ability to pay wages and a guarantee that the position of truss carpenter exists, along with an explanation for why it cannot produce the abovementioned forms which included an admission that its employees are "not legal" and do not have social security numbers.

Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Thus, even though the Employer insists that it does not execute detailed service contracts, the Employer was required to produce sufficient documentation establishing that a permanent, full-time truss carpenter position exists, such as a more detailed

[5] *See Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

invoice or billing summary setting forth the type of or amount of work performed by a truss carpenter for a particular project. The Employer provided none. Furthermore, the Employer's admission that it employs illegal aliens without social security numbers does not constitute a reasonable explanation for violating 20 C.F.R. § 656.20(c)(7), which states that an employer's job opportunity terms, conditions and occupational environment shall not be contrary to State or Federal law. Thus, the Employer has not met its burden.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.